Case History Log Report

Case Number: 11C21877

Case Title: Yarbourgh v. Sides
Case Type:
Department:
Plaintiff: Jack Yarbrough
Prosecution: John Edward Storkel; William D. Brandt
Defendant: Charles Sides
Defense: Mark Hoyt

Date: 6/3/2013
Location: Default Location
Judge: Mary James
Clerk: James Fiske
Bailiff:

Event Time	Log Event	
10:08:05 AM	Case Started	
10:08:14 AM	Judge calls case.	
	Note: JAVS Administrator	Mr. Yarbrough with atty Brandt and Mr. Sides with Mr. Hoyt
10:08:55 AM	Mr. Brandt	
10:09:54 AM	Atty's ask for a few minutes to discuss settlement.	
10:10:12 AM	Case Recessed	
10:28:32 AM	Case Resumed	
10:28:36 AM	Judge Calls case	
10:28:44 AM	MR. Brandt	
	Note: JAVS Administrator	Recites the settlement. Mr. Sides will have a six month period to purchase the properties in question. If he can't do this he will then have another six months to pay 1.1 million dollars to Mr. Yarbrough.
10:31:37 AM	MR. Hoyt	
	Note: JAVS Administrator	Mr. Sides to give 5 two year passes to the courthouse to the Plaintiff.
10:33:18 AM	Judge	
10:33:22 AM	Mr. Brandt, talks about some limitations set on the properties.	
	Note: JAVS Administrator	Mr. Yarbrough talks about his objection, approved for 11 lots, he has applied to reduce them to 4 lots.
10:35:32 AM	Mr. Hoyt	
10:36:30 AM	Mr. Yarbrough	
10:37:18 AM	Both parties agree to the stip JGM.	
10:38:19 AM	Case Recessed	

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK R. YARBROUGH Plaintiff, v. CHARLES A. SIDES, Defendant.	Case No. 11C21877 COMPLAINT FOR BREACH OF CONTRACT NOT SUBJECT TO MANDATORY ARBITRATION (1,220,700.00)

COMES NOW the Plaintiff, Jack R. Yarbrough, and for his claims for relief against Defendant as follows:

FACTS COMMON TO ALL COUNTS AND CAUSES OF ACTION:

1.

Charles A. Sides, (hereinafter Defendant) was at all material times and now is, a resident of Marion County, Oregon.

2.

On or about August 20th, 2007, Plaintiff and Defendant entered into a Sale Agreement for the purchase and sale of real property located in Marion County, Oregon. The Sales Agreement, (hereinafter the "St. Croix Agreement") is attached as Exhibit "A" and by this reference fully incorporated herein. Paragraph 2 of the Sales Agreement provides as follows:

> "The purchase price for the property is Seven Hundred Forty-Eight Thousand Five Hundred Dollars ($748,500), plus for the timber onsite an additional Two Thousand Five Hundred Dollars ($2,500.00), for a total of Seven Hundred Fifty One Thousand Dollars

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($751,000.00) and shall be payable to Lawyer's Title for benefit of Seller by cashier's check or wire transfer at closing."

3.

As part of the contract listed herein and Marked as Exhibit "A", Paragraph 9 of the St. Croix Agreement provides in pertinent part:

"Closing of the transaction shall be sixty days (60) after the City of Keizer's approval of the Area "C" development. . . ."

4.

On April 11, 2011, the City of Keizer approved Area "C" development, thereby triggering Defendant's obligation to purchase the real property on or before the lapse of 60 days or June 10, 2011.

5.

The terms of the real property transaction in said contract are fair and reasonable.

6.

On or about April 3, 2009, Plaintiff and Defendant executed an Addendum to the St. Croix Agreement (hereinafter the "First Addendum"). Said Addendum is Marked as Exhibit "B" and by this reference fully incorporated herein. Paragraph 5 of the Addendum provides as follows:

"It is further agreed that Buyer shall pay to Seller the sum of Two-Hundred Fifty-Thousand Dollars ($250,000.00) plus accruing daily interest from April 3, 2009, of Forty-Three Dollars and Eighty-Four Cents ($43.84) on March 1, 2010, unless the final closing has occurred."

7.

On or about March 18, 2011, Plaintiff and Defendant executed a second Addendum to the St. Croix Agreement. (hereinafter the "Second Addendum"). Paragraph 3 of said second Addendum provides as follows:

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"Chuck Sides and/or assigns agrees to purchase from Jack Yarbrough approximately 4600 yards of dirt for $3,500.00 and is responsible for the cost of moving said dirt currently situated on property known as "the Janrae property", located behind McCoy Freightliner and Pilot, to a previously agreed location in a large field south of St. Croix in Keizer, OR at a cost of $20,700."

8.

Although demand has been made on the Defendant to consummate and perform all obligations of the St. Croix Agreement and its Addendums. Defendant has failed and refused to consummate said transaction, or perform as promised.

9.

Plaintiff still remains ready, willing and able to consummate the transaction of said real property.

FOR A FIRST CAUSE OF ACTION, PLAINTIFF ALLEGES:
(Breach of Contract-Count One)

10.

Plaintiff re-alleges paragraphs 1 through 9 above as if set forth verbatim.

11.

On or about June 11, 2011 Defendant breached the contract by failing to close and consummate the transaction.

12.

As a result of Defendant's breach of contract, Plaintiff suffered economic damages in an amount to be proven at the time of trial but in no event less than $950,000.00

FOR A SECOND CAUSE OF ACTION, PLAINTIFF ALLEGES:

(Breach of Contract-Count Two)

13.

Plaintiff re-alleges paragraphs 1 through 12 above as if set forth verbatim.

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14.

Defendant breached the contract by failing to pay the $250,000.00 promised in paragraph 5 of the First addendum.

15.

As a result of Defendant's breach of contract, Plaintiff suffered economic damages in an amount to be proven at the time of trial but in no event less than $250,000.00.

FOR A THIRD CAUSE OF ACTION, PLAINTIFF ALLEGES:
(Breach of Contract-Count Three)

16.

Plaintiff re-alleges paragraphs 1 through 15 above as if set forth verbatim.

17.

Defendant breached the contract by failing to perform as promised in paragraph 3 of the Second Addendum.

18.

As a result of Defendant's breach of contract, Plaintiff suffered economic damages in an amount to be proven at the time of trial but in no event less than $20,700.00.

WHEREFORE, Plaintiff prays for judgment in favor of Plaintiff and against Defendant in the following particulars:

A) UPON PLAINTIFF'S FIRST CLAIM AND COUNT FOR RELIEF:

1. For economic damages in the amount of $950,000.00;
2. For costs of suit incurred herein;
3. For such other and further relief as to the court may seem appropriate.

B) UPON PLAINTIFF'S SECOND CLAIM AND COUNT FOR RELIEF:

1. For economic damages in the amount of $250,000.00;
2. For costs of suit incurred herein;
3. For such other and further relief as to the court may seem appropriate.

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C) UPON PLAINTIFF'S THIRD CLAIM AND COUNT FOR RELIEF:

1. For economic damages in the amount of $20,700.00;
2. For costs of suit incurred herein;
3. For such other and further relief as to the court may seem appropriate.

DATED this 3RD Day of OCTOBER, 2011.

John Storkel, OSB No. 850871
Attorney for Plaintiff

JOHN E. STORKEL
ATTORNEY AT LAW
1415 LIBERTY STREET SE
SALEM, OREGON 97302
(503) 363 6625

SALE AGREEMENT

THIS SALE AGREEMENT (***"Agreement"***), is made and entered into on August 20, 2007, by and between Jack Yarbrough, hereinafter called ***"Seller,"*** and Charles A. Sides, and or assigns, hereinafter called ***"Buyer."***

AGREEMENT:

1. Sale of Property

Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller that certain real property and all improvements thereon situated in the City of Keizer, County of Marion and State of Oregon, legally described on ***Exhibit A*** which is attached hereto and incorporated herein, and which is commonly known as: Tax Lots 1700, 1800, and 1900 in Township 6S, Range 3W, Section 36, Marion County, Oregon (the ***"Property"***).

2. Purchase Price

The purchase price for the Property is Seven Hundred Forty-Eight Thousand Five Hundred Dollars ($748,500), plus for the timber onsite an additional Two Thousand Five Hundred Dollars ($2,500), for a total of Seven Hundred Fifty One Thousand Dollars ($751,000) and shall be payable to Lawyer's Title for benefit of Seller by cashier's check or wire transfer at closing:

3. Rents

Seller shall receive the rent checks for the current rent amounts from the renters of the properties located at 5635 and 5655 Ridge Drive. Buyer shall supply Seller with a sixty (60) day written notice to vacate renters from property and complete all requested salvaging work within that sixty day period.

4. Salvage Rights

After Closing, Seller has rights to enter the Buyer's Property located at 5635 and 5655 Ridge Drive for Salvage Right's. However, Seller or any approved person by Seller to do salvage work shall not hold Buyer liable for any injury whatsoever that may occur on, in, or around the property.

5. Title Insurance

Seller shall furnish to Buyer in due course after closing a standard coverage title insurance policy issued by Lawyer's Title in the amount of the Purchase Price, showing good and marketable title subject to the standard exceptions, easements and covenants of record.

6. **Assignment**

The Buyer's rights in this Agreement are assignable without prior written consent of Seller.

7. **Deed and Encumbrances**

The Property is to be conveyed, unless otherwise provided, by Special Warranty Deed, free and clear of all liens and encumbrances created by Seller except zoning ordinances, covenants, conditions and restrictions, building and use restrictions, easements of record, and liens for property taxes not yet due. All of Seller's obligations collateral and direct shall merge at closing.

8. **Prorate**

Seller and Buyer agree to prorate the taxes for the current tax year, interest and other items as of the Signing Date. If the closing occurs before the tax rate is fixed for the then current tax year, the apportionment of taxes shall be made on the basis of the tax rate for the preceding tax year applied to the latest assessed valuation of the Property, and when the tax rate is fixed for the tax year in which the closing occurs, Seller and Buyer shall adjust the proration of taxes and, if necessary, shall refund or pay such sums to the other party as shall be necessary to effect such adjustment.

9. **Closing**

Closing of the Transaction shall be sixty days (60) after the City of Keizer's approval of the Area "C" development. Seller shall carry the property and Buyer and Seller agree that the carry cost shall be 8% per annum. This transaction shall be closed in escrow by Lawyer's Title as escrow agent, the cost of which shall be shared equally between Seller and Buyer. Buyer and Seller hereby agree that ~~Andrea~~ Brandi, with Lawyer's Title, will act as the closing agent.

10. **Possession**

Possession of the Property is to be delivered to the Buyer on the Closing Date.

11. **Binding Effect**

Subject to the restriction on assignment set forth above, this Agreement is binding upon the heirs, executors, administrators, successors and permitted assigns of the Buyer and Seller.

12. **Rule of Construction**

Any rule of construction interpreting a document against its drafter shall be inapplicable.

13. **Period of Limitation**

An action or arbitration arising under this Agreement shall only be commenced within one year of the date hereof. The parties agree such one year limitation is reasonable.

14. Integration

This Agreement embodies the entire agreement of the parties hereto. Buyer acknowledges that Buyer has not relied upon any statements made by Seller that are not set out in writing in this Agreement. If any portion of this Agreement is deemed to be invalid, the remainder hereof shall be given full force and effect.

15. Time of Essence

Time is of the essence of the payment and performance of each of the obligations under this Agreement.

16. Confidentiality and Non-Disclosure

Buyer understands that any and all information and materials disclosed by Seller and made available by Seller to Buyer are for the limited purposes of evaluating this transaction. Buyer agrees that such information and materials will at all times be kept confidential and will not be disclosed to any third party without the express written consent of Seller. Buyer may, however, disclose such information and materials to Buyer's attorneys, accountants and advisers in connection with this transaction only, provided that such persons agree to be bound by the confidentiality and non-disclosure provisions hereof.

17. Governing Law and Venue

The parties hereby submit to jurisdiction in Marion County, Oregon and agree that any and all disputes arising out of or related to this Agreement shall be litigated exclusively in the Circuit Court for Marion County, Oregon and in no federal court or court of another county or state. Each party to this Agreement further agrees that pursuant to such litigation, the party and the party's officers, employees, and other agents shall appear, at that party's expense, for deposition in Marion County, Oregon.

SELLER:

JACK YARBROUGH

By: Jack Yarbrough
Jack Yarbrough

BUYER:

CHARLES A. SIDES AND/OR ASSIGNS

By:
Charles A. Sides and/or assigns

Exhibit "A"

PARCEL I:

Beginning at a point that is South 0.80 chains and East 8.92 chains and East 138.27 feet and North 555.79 feet from the Northeast corner of the William Pugh Donation Claim No. 41 in Section 36 in Township 6 South, Range 3 West of the Willamette Meridian in the City of Keizer, Marion County, Oregon; running thence East 138.27 feet; thence North 65.00 feet, more or less, to the Southwest corner of that tract of land conveyed to George L. Whitney and Ella Mae Whitney by deed recorded in Book 589, Page 512, Deed Records for Marion County, Oregon; thence West along the Westerly extension of said South line, 138.27 feet; thence South 65.00 feet, more or less, to the point of beginning.

EXCEPTING THEREFROM a strip 30 feet wide along the West side for roadway purposes.

PARCEL II:

Beginning at a point that is South 0.80 chains and East 8.92 chains and East 138.27 feet and North 444.79 feet from the Northeast corner of the William Pugh Donation Claim No. 41 in Section 36 in Township 6 South, Range 3 West of the Willamette Meridian in the City of Keizer, Marion County, Oregon; running thence East 138.27 feet; thence North 111.00 feet; thence West 138.27 feet; thence South 111.00 feet to the point of beginning.

EXCEPTING THEREFROM a strip 30 feet wide along the West side for roadway purposes.

PARCEL III:

Beginning at a point that is South 0.80 chains and East 8.92 chains and East 138.27 feet and North 333.79 feet from the Northeast corner of the William Pugh Donation Claim No. 41 in Section 36 in Township 6 South, Range 3 West of the Willamette Meridian in the City of Keizer, Marion County, Oregon; running thence East 138.27 feet; thence North 111.00 feet; thence West 138.27 feet; thence South 111.00 feet to the point of beginning.

EXCEPTING THEREFROM a strip 30 feet wide along the West side for roadway purposes.

St Croix Agreement Addendum

Jack Yarbrough, Seller and Charles Sides and/or assigns, Buyer entered into a Sales Agreement dated August 20, 2007, a copy of which is enclosed as Exhibit 1.

It is expressly agreed by the parties that this Addendum is supplemental to the contract of August 20, 2007, which is made a part by reference, and all terms, conditions, and provisions of the original contract, unless specifically modified, are to apply to this contract and are made a part of this contract as though expressly rewritten, and included herein.

Due to the fact that the property still has not closed in Escrow, Buyer agrees to provide additional security, consisting of 13 lots in Mill City, OR, which is referred to as "Santiam Pointe (See Exhibit 2 for legal description and plat map) and grants Seller a First Trust Deed on all lots. Buyer will provide title insurance on said lots through Lawyers Title.

It is also agreed that as the lots sell at Santiam Pointe, all funds will be first applied to the interest, then principal of the original Sales Agreement.

It is further agreed that Buyer shall pay to Seller the sum of Two-Hundred Fifty-Thousand Dollars ($250,000.00) plus accruing daily interest from April 3, 2009, of Forty-Three Dollars and Eighty-Four Cents ($43.84) on March 1, 2010, unless the final closing has occurred.

In the event of any conflict, inconsistency, or incongruity between the provisions of this Addendum and any of the provisions of the original contract of August 20, 2007, the provisions of the Addendum shall in all respects govern and control.

Charles Sides — 4/3/09 Date

Jack Yarbrough — 4-5-09 Date

Exhibit B pg 1

St Croix Agreement Addendum #2

Jack Yarbrough, Seller and Charles Sides and/or assigns, Buyer, entered into a Sales Agreement dated August 20, 2007, and a St Croix Agreement Addendum, Signed by Charles Sides on 4/3/09 and Jack Yarbrough on 4/5/09, copies of which are enclosed as Exhibit 1.

It is expressly agreed by the parties that this Addendum # 2 is Supplemental to the contract of August 20, 2007, and the St Croix Agreement Addendum, signed on April 3rd & 5th, 2009, which is made a part by reference, and all terms, conditions, and provisions of the original contract, unless specifically modified, are to apply to this contract and are made a part of this contract as though expressly rewritten, and included herein.

Chuck Sides and/or assigns agrees to purchase from Jack Yarbrough, approximately 4600 yards of dirt for $3,500.00 and is responsible for the cost of moving said dirt currently situated on property known as "the Jenrae property", located behind McCoy Freightliner and Pilot, to a previously agreed location in a large field south of St Croix in Keizer, OR at a cost of $20,700.

Chuck Sides is also responsible for all necessary permits, cost of off-road site improvements and clean-up, correcting any damage to seller's easement access road i.e., grading, rocking, and compacting total amount being $2,500.

The total amount of above costs ($26,700) is to be added to the sales price of St Croix lots at the rate of 12% and is to be paid no later than May 14, 2011.

Chuck Sides acknowledges that the 4600 yards of dirt has already been moved as per the contract before the signing of this agreement.

Charles Sides — Date: 3-18-11

Jack Yarbrough — Date: 3-18-11

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK R. YARBROUGH, Plaintiff, vs. CHARLES A. SIDES, Defendant.	Case No. 11C-21877 DEFENDANT'S ANSWER

Defendant, for his Answer to Plaintiff's Complaint on file herein, admits, denies, and alleges as follows:

1.

Admits Paragraphs 1 and 2.

2.

In response to Paragraph 3, admits that Section 9 of the Sale Agreement & Earnest Money Receipt provides:

> "Closing of the Transaction shall be sixty days (60) after the City of Keizer's approval of the Area "C" development. Seller shall carry the property and Buyer and Seller agree that the carry cost shall be 8% per annum. This transaction shall be closed in escrow by Lawyer's Title as escrow agent, the cost of which shall be shared equally between Seller and Buyer. Buyer and Seller hereby agree that Brandi, with Lawyer's Title, will act as the closing agent."

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3.

In response to Paragraph 4, Defendant admits that on April 11, 2011, the City of Keizer issued preliminary approval of the Area "C" development, but denies that said approval was final. Defendant further alleges that the approval was appealed and the matter is currently in the Oregon Court of Appeals, and, therefore, final approval has not been given, the City of Keizer cannot issue building permits for the subject property, and Defendant's obligation to purchase the property has not yet been triggered.

4.

Defendant admits Paragraphs 5, 6, and 7.

5.

Defendant denies Paragraphs 8 and 9 in its entirety.

6.

In response to Paragraph 10, Defendant admits those items admitted above and denies the allegations denied above.

7.

Defendant denies Paragraphs 11 and 12 in their entirety.

8.

In response to Paragraph 13, Defendant admits those items admitted above and denies the allegations denied above.

9.

In response to Paragraph 14, Defendant denies that he breached the Agreement and further alleges that in lieu of payment, in March, 2010, Defendant deeded to Plaintiff the

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13 lots at Santiam Pointe in full and final satisfaction of all obligations arising from Addendum 2. Plaintiff accepted the deeds to the lots and has exercised dominion and control over those lots since that time.

10.

In response to Paragraph 16, Defendant admits those items admitted above and denies the allegations denied above.

11.

In response to Paragraph 17, Defendant admits that he agreed to buy the dirt for $3,500.00 and admits that the dirt has been moved, but denies that payment is due because the Agreement provides "the total amount of above costs ($26,700.00) is to be added to the sale price of St. Croix lots at the rate of 12% and is to be paid no later than May 14, 2011." The sale of the St. Croix lots has not yet taken place and will not take place until the City of Keizer's approval of Area "C" is final and the time for any further appeals has been exhausted.

WHEREFORE, Defendant prays for Judgment in favor of Defendant and against Plaintiff for an award of his costs and disbursements incurred herein.

DATED this 10th day of November, 2011.

LAW OFFICES OF DAVID HILGEMANN

By: _____
David A. Hilgemann, OSB #721215
Of Attorneys for Defendant

Trial Attorney: David A. Hilgemann, OSB #721215

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

v.

CHARLES A. SIDES,

Defendant.

Case No. 11 C 21877

MOTION FOR CHANGE OF JUDGE

MOTION FOR CHANGE OF JUDGE

Comes now the Plaintiff, Jack R. Yarbrough by and through attorney, John E. Storkel and pursuant to ORS 14.260 hereby moves for a change of judge in this proceeding. The plaintiff requests that Judge Albin W. Norblad be disqualified and that it be reassigned to another judge. Thank you for your consideration in this matter.

DATED: November 28, 2011

John E. Storkel, OSB. No. 850871
Attorney for Plaintiff

JOHN E. STORKEL
ATTORNEY AT LAW
1415 LIBERTY STREET SE
SALEM, OREGON 97302
(503) 363 6625

ENTERED

NOV 29 2011

Marion County Circuit Court

STATE OF OREGON
Marion County Circuit Courts
NOV 28 2011
FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

v.

CHARLES A. SIDES,

Defendant.

Case No. 11 C 21877

AFFIDAVIT

State of Oregon)
) ss
County of Marion)

I, John E. Storkel, attorney for plaintiff, Jack Yarbrough being duly sworn on oath, say as follows:

My client, Jack Yarbrough believes he cannot have a fair and impartial trial or hearing before Judge Albin W. Norblad. This motion and affidavit is made in good faith and not for the purpose of delay.

DATED: November 28, 2011

John E. Storkel, OSB. No. 850871
Attorney for Plaintiff

Subscribed and Sworn to before me this 28th day of November, 2011.

Notary Public for Oregon
My commission expires: 4-19-13

OFFICIAL SEAL
SHERRILL ANN WARGNIER
NOTARY PUBLIC - OREGON
COMMISSION NO. 438032
MY COMMISSION EXPIRES APR. 19, 2013

JOHN E. STORKEL
ATTORNEY AT LAW
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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

v.

CHARLES A. SIDES,

Defendant.

Case No. 11C 21877

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

UTCR 5.050 – ORAL ARGUMENT

Time for Oral Argument is 30 minutes.

Official Court Reporting Services are request.

COMES NOW Plaintiff by and through his attorney, John E. Storkel, and moves this Court for partial summary judgment against Defendant. In support of the foregoing motion, Plaintiff will rely upon the provisions of ORCP 47, the pleadings in this action, arguments, memoranda, declarations and exhibits.

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I. POINTS AND AUTHORITIES

A. Standards for Summary Judgment.

The court is directed to render summary judgment, "if the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." ORCP 47C.

The determination of whether or not there is a "genuine issue of material fact" precluding summary judgment under the amendment to ORCP 47 is made on the evidence of both parties. *Jones v. General Motors Corp*, 139 Or. App. 244, 256, 911 P2d 1243 (1996).

B. Undisputed Facts:

On or about August 20th, 2007, Plaintiff and Defendant entered into a Sale Agreement for the purchase and sale of real property located in Marion County, Oregon. The Sales Agreement, (hereinafter the "St. Croix Agreement") is attached as Exhibit "A" to the Yarbrough Declaration and by this reference fully incorporated herein. Paragraph 2 of the Sales Agreement provides as follows:

> "The purchase price for the property is Seven Hundred Forty-Eight Thousand Five Hundred Dollars ($748,500), plus for the timber onsite an additional Two Thousand Five Hundred Dollars ($2,500.00), for a total of Seven Hundred Fifty One Thousand Dollars ($751,000.00) and shall be payable to Lawyer's Title for benefit of Seller by cashier's check or wire transfer at closing."

As part of the contract listed herein and Marked as Exhibit "A" attached to the Yarbrough Declaration Paragraph 9 of the St. Croix Agreement provides in pertinent part:

> Closing of the transaction shall be sixty days (60) after the City of Keizer's approval of the Area "C" development. . . ."

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On April 11, 2011, the City of Keizer approved Area "C" development, thereby triggering Defendant's obligation to purchase the real property on or before the lapse of 60 days or June 10, 2011. See Yarbrough Declaration.

On or about April 3, 2009, Plaintiff and Defendant executed an Addendum to the St. Croix Agreement (hereinafter the "First Addendum"). Said Addendum is Marked as Exhibit "B" to the Yarbrough Declaration and by this reference fully incorporated herein. Paragraph 5 of the Addendum provides as follows:

"It is further agreed that Buyer shall pay to Seller the sum of Two-Hundred Fifty-Thousand Dollars ($250,000.00) plus accruing daily interest from April 3, 2009, of Forty-Three Dollars and Eighty-Four Cents ($43.84) on March 1, 2010, unless the final closing has occurred."

On or about March 18, 2011, Plaintiff and Defendant executed a second Addendum to the to the St. Croix Agreement marked as Exhibit "C" to the Yarbrough Declaration. (hereinafter the "Second Addendum"). Paragraph 3 of said second Addendum provides as follows:

"Chuck Sides and/or assigns agrees to purchase from Jack Yarbrough approximately 4600 yards of dirt for $3,500.00 and is responsible for the cost of moving said dirt currently situated on property known as "the Janrae property", located behind McCoy Freightliner and Pilot, to a previously agreed location in a large field south of St. Croix in Keizer, OR at a cost of $20,700."

Although demand has been made on the Defendant to consummate and perform all obligations of the St. Croix Agreement and its Addendums. Defendant has failed and refused to consummate said transaction, or perform as promised.

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Defendant is in default under Exhibit "A," "B," "C," to the Yarbrough Declaration in the following list of particulars:

1. On or about June 11, 2011 Defendant breached the contract by failing to close and consummate the transaction.

2. Defendant breached the contract by failing to pay the $250,000.00 promised in paragraph 5 of the First addendum.

3. Defendant breached the contract by failing to perform as promised in paragraph 3 of the Second Addendum.

II. CONCLUSION

Because there is no question of fact regarding the status of the default of Defendant, Plaintiffs is entitled to a judicial decree of this court finding Defendants in material breach, and for other appropriate relief. For the reasons set forth herein, this Court should grant Plaintiff's Motion for Partial Summary Judgment

DATED this 9th day of March, 2012.

John E. Storkel

John E. Storkel, OSB. No. 850871
Attorney for Plaintiff

JOHN E. STORKEL
ATTORNEY AT LAW
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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK YARBROUGH, Plaintiff, v. **CHUCK SIDES,** Defendant	**Case No. 11C21877** **DEFENDANT CHUCK SIDES' RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** **(Oral Argument Requested)**

UTCR 5.050 Statement

Defendant Chuck Sides requests oral argument for Plaintiff Jack Yarbrough's Motion for Partial Summary Judgment, and estimates the time required for oral argument to be 30 minutes. Official court reporting services are requested.

Response

Defendant Chuck Sides ("Sides"), by and through his attorney Mark C. Hoyt of Sherman, Sherman, Johnnie & Hoyt, LLP, files this response to Plaintiff Jack Yarbrough's ("Yarbrough") Motion for Partial Summary Judgment. Yarbrough's motion for partial summary judgment should be denied because Yarbrough is seeking a determination that Sides is in breach of the parties' Sale Agreement before Sides' performance is even due. Development approval by the City of Keizer is a condition precedent to the closing of the parties' transaction and Sides' payment of the purchase

price. Development approval has not yet been obtained, and Sides' performance has therefore not yet been triggered. Further, to the extent that payments were due and owing under the parties' two addendums to the Sale Agreement, the payments have been made in full. Quite simply, Yarbrough seeks a judicial decree finding Sides in material breach of the Sale Agreement before a breach has even occurred.

In support of his response, Sides relies on the Points and Authorities set forth below, the Affidavit of Chuck Sides and the exhibits attached thereto, and the entire court file herein.

POINTS AND AUTHORITIES

I. Nature of the Case

This matter stems from a Sale Agreement between Yarbrough and Sides for the purchase of real property located adjacent to what is commonly known as Keizer Station Master Plan Area C. A condition precedent to the closing of the transaction was the City of Keizer's development approval of Area C. On April 18, 2011, the City of Keizer approved Area C. Yarbrough hangs his hat on this date as the date that triggered Sides' requirement to close the transaction and pay the purchase price. What Yarbrough fails to disclose is the fact that the April 18, 2011 approval was immediately appealed to the Land Use Board of Appeals ("LUBA") and thereafter appealed to the Court of Appeals. Ultimately, the Court of Appeals affirmed LUBA's decision to remand the approval of Area C back to the City of Keizer, which is where the "approval" is today. Despite Yarbrough's insistence, there is no valid approval of Area C, and therefore, no performance is due by Sides under the Sale Agreement.

Additionally, Yarbrough claims that Sides has breached two addendums to the Sale Contract, each of which detailed certain payments to be made. What Yarbrough

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fails to disclose is that in lieu of payment and in full satisfaction of Sides' obligations under the two addendums, Sides transferred certain lots in The Village at Santiam Pointe in Mill City, Oregon. Yarbrough accepted the conveyance, and has exercised dominion and control over the lots. Again, Yarbrough is seeking a determination that Sides breached the addendums when no breach has occurred.

II. Factual Background

On August 20, 2007, Yarbrough and Sides entered into a Sale Agreement in which Sides agreed to purchase and Yarbrough agreed to sell the real property commonly known as Tax Lots 1700, 1800, and 1900 in Township 6S, Range 3W, Section 36, Marion County, Oregon ("Property") for the purchase price of $751,000.00. Sides Dec., ¶2. The Property is adjacent to that portion of the Keizer Station Master Plan commonly known as Area C, and was being acquired by Sides in connection with the development of Area C. Sides Dec., ¶2. Accordingly, the City of Keizer's approval of the Area C development was a condition precedent to closing: "Closing of the Transaction shall be sixty days (60) after the City of Keizer's approval of the Area "C" development."

By April, 2009, Area C had not been approved, and therefore, no closing had occurred. The parties then entered into the St Croix Agreement Addendum in which Sides agreed to grant Yarbrough a Trust Deed on certain lots in Mill City, Oregon . On May 20, 2009, Sides, as managing member of Santiam Pointe, LLC, granted Yarbrough a Trust Deed on Lots 1 through 11 and Lot 19 in The Village at Santiam Pointe in Mill City, Oregon. Sides Dec., ¶3; Exhibit A. Further, Sides agreed to pay Yarbrough "the sum of Two-Hundred Fifty-Thousand Dollars ($250,000.00) plus accruing daily interest from April 3, 2009, of Forty-Three Dollars and Eighty-Four Cents ($43.84) on March 1,

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2010, unless the final closing has occurred." The $250,000.00 payment was to be credited to the purchase price. Sides Dec., ¶4.

By March 1, 2010, final closing had not occurred because the condition precedent, approval of Area C, had not occurred. Therefore, in lieu of the March 1, 2010 payment detailed in the St Croix Agreement Addendum, the parties agreed that Sides, as managing member of Santiam Pointe, LLC, would execute Deeds in Lieu of Foreclosure conveying the 12 lots in Mill City, Oregon to Yarbrough. Sides executed the necessary Deeds in Lieu of Foreclosure on February 17, 2011. Sides Dec., ¶5 & 7; Exhibit B. Yarbrough accepted the conveyance, and has exercised dominion and control over the lots since that time. Sides Dec., ¶5.

Shortly thereafter, the parties entered into the St Croix Agreement Addendum #2 dated March 18, 2011 whereby Sides agreed to purchase from Yarbrough approximately 4600 yards of dirt and pay for the cost of moving the dirt in the total amount of $26,700.00. The total amount of $26,700.00 was "to be added to the sales price of St Croix lots at the rate of 12% and is to be paid no later than May 14, 2011." Sides Dec., ¶6.

Had the St Croix lots already been conveyed, the parties could not have added the cost of the dirt to the price of the lots. Thus, the St Croix Agreement Addendum #2 added $26,700.00 to Sides' payment obligation for the lots.

That obligation was satisfied on April 18, 2011 when the deeds in lieu of foreclosure were recorded, thereby passing title of the lots to Yarbrough and satisfying Sides' payment obligations for the $250,000.00 and the $26,700.00.

On April 18, 2011, the City of Keizer City Council approved Area C. The "approval" was subject to the ability of an aggrieved party to appeal the determination to

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LUBA. The City of Keizer's decision was appealed on May 5, 2011 by Keep Keizer Livable and Kevin Hohnbaum. Sides Dec., ¶8; Exhibit C. On August 19, 2011, LUBA remanded the approval to the City of Keizer. Sides Dec., ¶9; Exhibit B. LUBA's remand was then appealed to the Court of Appeals, and on November 30, 2011, the Court of Appeals affirmed LUBA's decision without opinion. Sides Dec., ¶10; Exhibit E. Therefore, to date, there is no approval of Area C, as it has been remanded back to the City of Keizer.

Thus, while Sides still awaits the approval required to trigger his payment obligation, Yarbrough is suing him seeking summary judgment Sides needs to pay him now.

III. Summary Judgment Standard

Before a Motion for Summary Judgment can be granted, the court must find that there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law. ORCP 47. To demonstrate no material issue of fact exists, Plaintiff must show that when the record before the court is viewed in the light most favorable to Defendant no reasonable juror could return a verdict in Defendant's favor. ORCP 47C; *Stamper v. Salem-Keizer School District*, 195 Or App 291, 97 P3d 680 (2003). The adverse party has the burden of producing evidence on any issues raised in the motion for which the adverse party would have the burden of persuasion at trial. ORCP 47C. Plaintiff's Motion for Partial Summary Judgment can be granted only if there are no genuine issues of material fact and no reasonable juror could decide in Defendant's favor as a matter of law. *Jones v. General Motors Corporation*, 325 Or 404, 413-14, 939 P2d 608 (1997).

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IV. Legal Argument

A. One cannot sue for breach of contract when there has been no breach.

A material breach of a contract cannot occur if performance is not yet due. Performance is not yet due if a condition precedent has not yet occurred. A condition precedent is an event that, unless excused, must occur before a duty of immediate performance of a promise arises - before a breach can occur. *Spence v. Allen*, 199 Or 255, 260, 260 P2d 949 (1952).

In the present matter, development approval from the City of Keizer was a condition precedent to Sides' closing of the transaction and payment of the purchase price: "Closing of the Transaction shall be sixty days (60) after the City of Keizer's approval of the Area "C" development." To date, there is no valid approval of Area C. Sides cannot obtain building permits for Area C, or attempt to move forward with the development due to LUBA's remand of the City of Keizer's "approval" of Area C.

Since there is no approval of Area C, Sides has not even had the opportunity to breach the Sale Agreement; his performance is not yet due. Yarbrough's actions are akin to crying wolf; there simply is no breach at this time. Therefore, Yarbrough's Motion for Partial Summary Judgment must be denied.

B. Sides has fully performed under the St Croix Addendums.

Yarbrough asserts that Sides has not performed under either the St Croix Agreement Addendum or St Croix Agreement Addendum #2 (collectively, "St Croix Addendums"). Sides fully performed under the St Croix Addendums when he conveyed the 12 lots to Yarbrough and Yarbrough accepted the Deeds in Lieu of Foreclosure. The record demonstrates Sides performed under the St Croix Addendums. At the very least, there is a genuine issue of material fact as to whether the conveyance of the parcels to

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satisfy the obligation represents performance, and therefore, Yarbrough is not entitled to partial summary judgment.

The St Croix Agreement Addendum required Sides to grant Yarbrough a Trust Deed in certain lots located in Mill City, Oregon and pay the sum of $250,000.00 plus interest on Marcy 1, 2010, unless the final closing had already occurred. The $250,000.00 payment was to be credited to the purchase price. The St Croix Agreement Addendum #2 required Sides to pay the sum of $26,700.00 no later than May 14, 2011 for the purchase and cost of moving dirt. Yarbrough states that Sides has failed to perform under either Addendum, yet inexplicitly fails to disclose that by agreement of the parties, on April 18, 2011, Sides caused Deeds in Lieu of Foreclosure to be recorded in Marion County that conveyed 12 lots in Mill City, Oregon to Yarbrough in full satisfaction of the St Croix Addendums.

Sides performed under the St Croix Addendums when he conveyed the 12 lots in Mill City, Oregon to Yarbrough. In the alternative, at a minimum, there is a genuine question of fact as to whether Sides is in default under the St Croix Addendums. Therefore, Yarbrough is not entitled to partial summary judgment as a matter of law.

V. Conclusion

For the reasons stated above Plaintiff is not entitled to judgment as a matter of law. Therefore, Plaintiff's Motion for Partial Summary Judgment should be denied.

DATED this 2nd day of April, 2012.

SHERMAN, SHERMAN, JOHNNIE & HOYT, LLP

Mark C. Hoyt, OSB #92341
Of Attorneys for Defendant
Trial Attorney: Same

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK YARBROUGH, Plaintiff, v. **CHUCK SIDES,** Defendant.	**Case No. 11C21877** **DECLARATION OF CHUCK SIDES IN SUPPORT OF DEFENDANT CHUCK SIDES' RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUUDGMENT**

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I, Chuck Sides, do hereby declare under penalty of perjury the following:

1. I am the Defendant in this matter, and submit this Declaration in Support of Defendant Chuck Sides' Response to Plaintiff's Motion for Partial Summary Judgment.

2. On August 20, 2007, Yarbrough and I entered into a Sale Agreement in which I agreed to purchase from Yarbrough the real property commonly known as Tax Lots 1700, 1800, and 1900 in Township 6S, Range 3W, Section 36, Marion County, Oregon ("Property") for the purchase price of $751,000.00. The Property is adjacent to that portion of the Keizer Station Master Plan commonly known as Area C, and I was purchasing the Property in connection with the development of Area C. Therefore, pursuant to the Sale Agreement, I did not have to close the transaction until sixty days after the City of Keizer's approval of the Area C development.

3. By April, 2009, there was no approval for Area C, and therefore, no closing. Yarbrough and I then entered into the St Croix Agreement Addendum in which I agreed to grant Yarbrough a Trust Deed on certain lots in Mill City, Oregon. On May 20, 2009, I, as managing member of Santiam Pointe, LLC, granted Yarbrough a Trust Deed on Lots 1 through 11 and Lot 19 in The Village at Santiam Pointe in Mill City, Oregon. A copy of the Trust Deed for Lots 1 through 11 and Lot 19 in The Village at Santiam Pointe in Mill City, Oregon dated May 20, 2009 and recorded June 2, 2009 at Reel 3068, Page 483, records of Marion County, Oregon is attached hereto as Exhibit A and incorporated herein by this reference.

4. The St Croix Agreement Addendum also required payment in the amount of Two-Hundred Fifty-Thousand Dollars ($250,000.00) plus accruing daily interest from April 3, 2009, of Forty-Three Dollars and Eighty-Four Cents ($43.84) on March 1, 2010, unless the final closing had occurred. The $250,000.00 payment was to be credited to the purchase price. Final closing had not occurred by March 1, 2010 because the City of Keizer had not approved the Area C development.

5. Because final closing had not occurred by March 1, 2010, Yarbrough and I agreed that in lieu of the March 1, 2010 payment detailed in the St Croix Agreement Addendum, I would execute Deeds in Lieu of Foreclosure conveying Lots 1 through 11 and Lot 19 in The Village at Santiam Pointe in Mill City, Oregon to Yarbrough. I executed the necessary Deeds in Lieu of Foreclosure on February 17, 2011.

6. Shortly thereafter, Yarbrough and I entered into the St Croix Agreement Addendum #2 dated March 18, 2011 whereby I agreed to purchase from Yarbrough approximately 4600 yards of dirt and pay for the cost of moving the dirt in the total

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amount of $26,700.00. The total amount was "to be added to the sales price of St Croix lots at the rate of 12% and is to be paid no later than May 14, 2011."

7. The Deeds in Lieu of Foreclosure were recorded on April 18, 2011. Yarbrough accepted the conveyance, and has exercised dominion and control over the lots since that time. Therefore, the March 1, 2010 payment and the payment for the dirt and moving of the dirt due on or before May 14, 2011 were paid in full with the conveyance of Lots 1 through 11 and Lot 19 in The Village at Santiam Pointe in Mill, City, Oregon. A copy of the Deed in Lieu of Foreclosure for Lots 1 through 11 recorded on April 18, 2011 at Reel 3277, Page 341, records of Marion County, Oregon and a copy of the Deed in Lieu of Foreclosure for Lot 19 recorded on April 18, 2011 at Reel 3277, Page 342, records of Marion County, Oregon, are attached hereto as Exhibit B and incorporated herein by this reference.

8. The City of Keizer's City Council approved the design for Area C on April 18, 2011. The "approval" was subject to the ability of an aggrieved party to appeal the determination to LUBA. The approval was appealed on May 5, 2011 to the Land Use Board of Appeals. A copy of Keep Keizer Livable and Kevin Hohnbaum's Notice of Intent to Appeal is attached hereto as Exhibit C and incorporated herein by this reference.

9. On August 19, 2011, LUBA remanded the approval to the City of Keizer. A copy of LUBA's decision is attached hereto as Exhibit D and incorporated herein by this reference.

10. LUBA's decision was then appealed to the Court of Appeals. On November 30, 2011, the Court of Appeals affirmed LUBA's decision without opinion. A copy of the Court of Appeals decision is attached hereto as Exhibit E and incorporated herein by this reference.

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I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED at Salem, Oregon this 2nd day of April 2012.

Charles Sides

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Reel 3277 Page 342

Recordation Requested by:
Jack R. Yarbrough

After Recording Return to:
Jack R. Yarbrough
P.O. Box 20756
Keizer, Or 97307

Send Tax Statements to:
Jack R. Yarbrough
P.O. Box 20756
Keizer, Or 97307

DEED IN LIEU OF FORECLOSURE
(Non-merger)

Santiam Pointe LLC, by and through Charles A. Sides as Managing Member ("Grantor"), conveys to Jack R. Yarbrough ("Grantee"), the following real property (the "Property") commonly known as "Santiam Pointe"; and legally described as set forth on attached Exhibit "A", together with all Grantor's right, title, and interest in the Property. Grantor is the owner of the Property free and clear of all encumbrances except as described on Exhibit "B."

Grantor executed and delivered to Grantee a Trust Deed recorded on June 2nd, 2009, in Reel 3068, Page 483, Records of Marion County, Oregon, to secure payment of a Promissory Note in an undisclosed amount. The Note and Loan Agreement are in default and the Property is subject to foreclosure.

This deed in lieu of foreclosure ("Deed") is intended as a conveyance absolute in legal effect, as well as in form, of the title to the Property to Grantee and this Deed is not intended as security of any kind. Grantor waives, surrenders, and relinquishes any equity of redemption and statutory rights of redemption that Grantor may have in connection with the Property.

Grantor warrants that during the time period that the Property was owned by Grantor, the Property was never used for the generation, manufacture, storage, treatment, disposal, release, or threatened release of any hazardous substance, as those terms are defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended, 42 USC §9601 et seq., the Superfund Amendments and Reauthorization Act (SARA), other applicable state or federal laws, or regulations adopted pursuant to any of the foregoing. Grantor agrees to indemnify and hold Grantee harmless against any and all claims and losses resulting from a breach of this warranty.

This Deed does not effect a merger of the fee ownership and the lien of the Trust Deed described above. The fee and the lien shall hereafter remain separate and distinct. Grantee reserves its right to foreclose its Trust Deed at any time as to any party with any claim, interest, or lien on the Property.

Grantor has read and fully understands the above terms and is not acting under misapprehensions regarding the effect of this Deed, nor is Grantor under any duress, undue influence, or misrepresentations of Grantee, Grantee's agents, lawyers, or any other person.

Grantee does not expressly or impliedly agree to assume or pay any contract balances, debts, liens, charges, or obligations that relate or attach to the property.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

DATED: Feb 17th, 2011.

Santiam Pointe LLC, by and through
Charles A. Sides as Managing Member

STATE OF OREGON)
)
County of ~~Lane~~ Marion)
M.F.

This instrument was acknowledged before me on Feb. 17, 2011, by Charles A. Sides.

OFFICIAL SEAL
MICHAEL M PACHECO
NOTARY PUBLIC - OREGON
COMMISSION NO. 463088
MY COMMISSION EXPIRES OCTOBER 15, 2014

Michael M. Pacheco

Notary Public for Oregon
My commission expires: 10-15-14

Exhibit A

Legal Description:

Lots 19, THE VILLAGE AT SANTIAM POINTE in the City of Mill City, Marion County, Oregon. (Recorded July 19, 2000 in Volume 43, Page 91, Record of Town Plats for Marion County, Oregon.)

Exhibit B

1. A deed of trust to secure an indebtedness in the amount shown below,
   Amount: none disclosed
   Dated: May 20, 2009
   Trustor/Grantor: Santiam Pointe, LLC, a limited liability company
   Trustee: Ticor Title
   Beneficiary: Jack R. Yarbrough, an estate in fee simple
   Recording Date: June 2, 2009
   Recording No: Reel 3068, Page 483
   Includes additional property

2. A deed of trust to secure an indebtedness in the amount shown below,
   Amount: $500,000.00
   Dated: August 4, 2005
   Trustor/Grantor: Santiam Pointe, LLC
   Trustee: Ticor Title
   Beneficiary: Curt Pence Investments, LLC
   Recording Date: August 4, 2005
   Recording No: Reel 2517, Page 324

   An assignment of the beneficial interest under said deed of trust which names:
   Assignee: Northwest National, LLC
   Recording Date: January 28, 2008
   Recording No: Reel 2912, Page 477

   An agreement recorded June 2, 2009 at Reel 3068, Page 482 which states that this instrument was subordinated to the document or interest described in the instrument
   Recording Date: June 2, 2009
   Recording No: Reel 3068, Page 483

3. A deed of trust to secure an indebtedness in the amount shown below,
   Amount: $190,000.00
   Dated: August 4, 2005
   Trustor/Grantor: Santiam Pointe, LLC
   Trustee: Ticor Title
   Beneficiary: 2HMP, LLC
   Recording Date: August 4, 2005
   Recording No: Reel 2517, Page 325

   An assignment of the beneficial interest under said deed of trust which names:
   Assignee: Northwest National LLC
   Recording Date: January 28, 2008
   Recording No: Reel 2912, Page 478

   An agreement recorded June 2, 2009 at Reel 3068, Page 482 which states that this instrument was subordinated to the document or interest described in the instrument
   Recording Date: June 2, 2009
   Recording No: Reel 3068, Page 483

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK R. YARBROUGH, Plaintiff, vs. CHARLES A. SIDES, Defendant.	Case No. 11C21877 PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant opposes plaintiff's motion for summary judgment on several grounds, none of which have merit. Plaintiff has brought this lawsuit based upon unambiguous written agreements which require defendant to do the following: The first agreement requires defendant to pay plaintiff $751,000 for three lots known as the St. Croix lots when the City of Keizer grants approval of a zone change. It is undisputed that the City of Keizer granted that approval. Defendant had 60 days to pay after the approval was granted. Defendant failed to do so. Defendant's defense is that there was an appeal of the City of Keizer's approval and, therefore, since the zone change process has been delayed because of the appellate process, he is excused from performance. Defendant is wrong as a matter of law because the contract prepared by defendant, an experienced developer, does not contain any reference to the obligation to pay being deferred pending any appeals. The parties did not negotiate for that contingency. Defendant could have negotiated for that contingency and, had he put that in the contract, plaintiff may very well have not agreed. The point is, it is not in the contract and a party may not change the terms of a contract or ask a court to change the terms of a contract, particularly when there is no ambiguity. Had defendant wanted that term in the contract, he should have put it in the contract. He did not and, as a matter of law, he is obligated to make payment for the lots. If he fails to make payment for the lots, then plaintiff is entitled to

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judgment and would be entitled to execute that judgment against the property and have the lots sold and obtain a deficiency from defendant.

The second claim plaintiff has is for the immediate payment of $250,000. Defendant's defense to that claim is basically twofold. First, defendant defends on the same basis he defends his obligation to pay the $751,000, to wit it is not due because the City of Keizer has not approved the master plan. That defense is simply not valid as pointed out earlier in this memorandum. While the $250,000 is included in the $751,000, there is a distinct, separate promise on the part of defendant to pay that $250,000. If defendant pays the $250,000, he would certainly be entitled to a credit for it, but, of course, he has not paid it, hence this lawsuit. That separate and distinct promise is unambiguous and clear and is found in the contract addendum dated April 3, 2009. (See Declaration of Jack R. Yarbrough, Exhibit 1.) That language is as follows:

> It is further agreed that Buyer shall pay to Seller the sum of Two-Hundred Fifty-Thousand Dollars ($250,000.00) plus accruing daily interest from April 3, 2009, of Forty-Three Dollars and Eighty-Four Cents ($43.84) on March 1, 2010 unless the final closing has occurred.

There is no equivocation in that language. Defendant agreed to pay the $250,000 on or before that date and he has failed to do so.

Defendant's second defense to payment of the $250,000 is equally meritless. Defendant contends that he deeded eleven lots in Mill City in lieu of foreclosure in exchange for the $250,000. Again, defendant is writing terms into the agreement that are simply not there. Defendant also neglects to bring to the court's attention an agreement which makes it clear that plaintiff is entitled to sell the lots. (See Declaration of Jack R. Yarbrough, Exhibit 2.) The agreements make it clear that plaintiff is entitled to take possession of the eleven lots and sell them, even at a fire sale price, and credit the amount received towards the $751,000 owed. The agreement says nothing about the deed in lieu of foreclosure serving to extinguish defendant's obligation to pay the $250,000. The language is as follows:

> In the event the St. Croix Sales Agreement does not close within 90 days of this agreement, or on or before May 18, 2011, then Yarbrough shall be entitled to immediately market the Property conveyed by the deeds executed herein and as part of this agreement, including reduction of price at his discretion to facilitate a quick sale. Yarbrough shall have the right thereafter to seek further recovery against Sides and or Santiam LLC for any deficiency on the obligations set forth in subparagraph "c" above.

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Again, defendant tries to put terms into the contract that are simply not there and the law does not permit defendant to do that, nor does it allow the court to supply terms to a clear and unambiguous agreement. ORS 42.230 states:

> In the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.

ORS 42.230 is quite clear: a court reviewing a contract may not insert terms that are not there. Johnson v. Campbell, 259 Or 444, 447, 489 P2d 69 (1971) (restriction of property "for residential use only" did not mean that the property was to be used only for *single family* residences; that interpretation would add to and thus be inconsistent with the express terms of the covenant); Hunnell v Roseburg Resources Co., 183 Or App 228, 51 P3d 680 (2002) (reinserting inadvertent omissions is not the office of the judge in interpreting instruments; that office is "to ascertain and declare what is, in terms or in substance, what "is contained therein, not to insert what has been omitted." ORS 42.230). *See also* Olson v Van Horn, 182 Or App 264, 48 P3d 869 (2002) Thus, plaintiff is entitled to summary judgment on that claim as well.

The third claim is a separate and distinct claim brought by plaintiff for payment of $26,700, which defendant agreed to pay to plaintiff unequivocally for dirt which plaintiff moved on to property owned by defendant Sides. Again, the agreement is clear and unambiguous that defendant will pay plaintiff by a date certain. (See Declaration of Jack R. Yarbrough, Exhibit 3.) He has failed to do so and plaintiff is entitled to summary judgment. Once again, defendant attempts to expand the terms of the parties' agreement by adding terms that are simply not there. The agreement with respect to the $26,700 is clear and unequivocal. The language of the agreement is as follows:

> The total amount of above costs ($26,700) is to be added to the sales price of St. Croix lots at the rate of 12% and is to be paid no later than May 14, 2011.

The date certain has come and gone nearly a year ago. It has not been paid. Plaintiff is entitled to summary judgment on that claim also.

In conclusion, plaintiff is entitled to judgment against defendant for the full amount of the purchase price. Plaintiff is not trying to double collect. If he gets his judgment for $751,000 certainly he is not

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entitled to a separate judgment for $250,000. However, if the court were to believe that the contract contained an implied term that the City of Keizer approval meant the approval after all appeals were exhausted, then clearly plaintiff is entitled to a judgment for $250,000.

With respect to the $26,700, likewise, plaintiff is entitled to a judgment in that amount immediately.

In summary, none of the defenses have merit. The agreements are clear on their face. Judgment should enter in favor of plaintiff in a manner that requires plaintiff to credit any amounts received for the eleven lots against the full amount of the judgment.

DATED this 10th day of April, 2012.

William D. Brandt, OSB #72036
Attorney for Plaintiff

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CITY COUNCIL, CITY OF KEIZER, STATE OF OREGON

ORDER

IN THE MATTER OF THE APPLICATION OF E VILLAGE, LLC FOR APPROVAL OF THE KEIZER STATION MASTER PLAN/SUBDIVISION (AREA C – KEIZER STATION) (MASTER PLAN CASE NO. 2010-16/ SUBDIVISION CASE NO. 2010-18)

The City of Keizer orders as follows:

Section 1. THE APPLICATION. This matter comes before the Keizer City Council on the application of E Village, LLC for a master plan/subdivision for the Keizer Station Plan – Area C.

Section 2. JURISDICTION. The land in question in this Order is within the city limits of the City of Keizer. The City Council is the governing body for the City of Keizer. As the governing body, the City Council has the authority to make final land use decisions concerning land within the city limits of the City of Keizer.

Section 3. PUBLIC HEARING. In addition to the public hearings from the Planning Commission, public hearings were held on this matter before the Keizer City Council on February 22, 2011 and March 7, 2011. The following persons either appeared at the City Council hearings or provided written testimony on the application before the Council:

1. Nate Brown, Community Development Director

Keizer City Attorney
930 Chemawa Road NE
PO Box 21000
Keizer, Oregon 97307
503-856-3433

2. Rick Hammerquist, Opponent
3. Jacque Moir, Interested Citizen
4. Janet Templar, Opponent
5. Bronwyn Curtis, Opponent
6. Richard C. Stein, Opponent Attorney
7. Rick Nyes (Greenlight Engineering), Opponent Engineer
8. Wendie Kellington, Developer Attorney
9. Charles Baker, Opponent
10. Sandi King, Opponent
11. Eric Meurer, Proponent
12. Carol A. Doerfler, Opponent
13. Joan Pauley, Opponent
14. Frank Pauley, Opponent
15. Rhonda Rich, Opponent
16. Rich Duncan, Proponent
17. Steve Sidwell,, Interested Citizen
18. Pete Busiglio, Opponent
19. Robert Thompson, Opponent
20. Ken LeDuc, Opponent
21. Jane Mulholland, Opponent
22. Kevin Hohnbaum, Opponent
23. Jim Boatner, Proponent
24. David Philbrick, Opponent
25. Cathy Philbrick, Opponent
26. Laurie Wire, Opponent
27. Jeff Anderson, Interested Citizen
28. Daniel Evans, Interested Citizen
29. Jim Jobes, Opponent
30. Andrew Mulholland, Opponent
31. Kittelson & Associates, Inc., Transportation Engineering
32. Joleen Vohland, Proponent
33. Richard Woelk, City Transportation Consultant
34. Martin Doerfler, Opponent
35. Chuck Sides, Developer
36. Forrest Anderson, Opponent
37. Theresa Thompson, Opponent
38. Frances Freebury, Proponent

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39. Ricardo Becerril, Proponent
40. Carol Maurer, Opponent
41. Justin Labhart, Proponent
42. Paul Schulz, Proponent
43. Hermanus Steyn, Developer Consultant
44. Mark Anderson, Developer Consultant
45. Jeremy McPherson, Developer Consultant
46. Matt Hughart, Developer Consultant
47. Mike Collun, Proponent
48. Roland Mack, Proponent
49. Dennis Koho, Interested Citizen
50. Sam Goesch, Interested Citizen
51. Victoria Goesch, Interested Citizen
52. Don Olheiser, Proponent
53. William Verboort, Proponent
54. Matt Williams, Proponent
55. Rick Day, Proponent
56. Armenda Lathrop, Opponent
57. Jack Yarbrough, Proponent
58. Alan Roodhouse, Developer

Section 4. EVIDENCE. Evidence before the City Council in this matter is summarized in Exhibit "A" attached.

Section 5. OBJECTIONS. No objections have been raised as to notice, jurisdiction, alleged conflicts of interest, evidence presented or testimony taken at the hearing.

Section 6. CRITERIA AND STANDARDS. The criteria and standards relevant to the decision in this matter are set forth in Exhibit "B" attached.

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Section 7. FACTS. The facts before the City Council in this matter are set forth in Exhibit "C" attached.

Section 8. JUSTIFICATION. Justification for the City Council's decision in this matter is explained in Exhibit "D" attached.

Section 9. ACTION. The decision of the City Council is set forth in Exhibit "E" attached.

Section 10. FINAL DETERMINATION. This Order is the final determination in this matter.

Section 11. EFFECTIVE DATE. This Order shall take effect immediately upon its passage.

Section 12. APPEAL. A party aggrieved by the final determination in a proceeding for a discretionary permit or a zone change may have it reviewed under ORS 197.830 to ORS 197.834.

PASSED this 18th day of April, 2011.

SIGNED this 18th day of April, 2011.

Mayor

City Recorder

Keizer City Attorney
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CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OREGON 97309-0869

MARY MERTENS JAMES
Circuit Court Judge
PHONE: (503) 373-4303
FAX: (503) 373-4305

July 13, 2012

John Storkel
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1415 Liberty St SE
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Mark Hoyt
Attorney at Law
PO Box 2247
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Re: Jack Yarbrough v. Charles Sides
Case No. 11C21877

Dear Counsel:

This matter came before the Court on Plaintiff's Motion for Partial Summary Judgment. Oral argument took place on June 20, 2012. John Storkel appeared and represented Plaintiff Jack Yarbrough; Mark Hoyt appeared and represented Defendant Charles Sides.

The court received Plaintiff's Motion for Partial Summary Judgment, Defendant Chuck Sides' Response to Plaintiff's Motion for Partial Summary Judgment and Plaintiff's Reply in Support of Motion for Partial Summary Judgment together with declarations.

SUMMARY OF MOTION AND PRELIMINARY DETERMINATIONS

Plaintiff Jack Yarbrough seeks partial summary judgment regarding three separate written contractual obligations based. The contracts include a Sale Agreement entered on August 20, 2007, and two addendums (the first is dated April 3 and April 5, 2009; the second, March 18, 2011). He asserts that defendant Charles Sides breached each of the contracts (Claims 1 through 3). A fourth agreement, entered between the parties on February 17, 2011, is also material to the parties' rights and obligations. Following oral argument, the Court denied Plaintiff's Motion as to the

Second Claim; and allowed Plaintiff's Motion as to the Third Claim. I then took the First Claim under advisement, and reserved the right to review the others. I have carefully reviewed the pleadings, exhibits and undisputed material facts presented, and applicable statutes and case law. Now, being fully advised, this letter sets forth my decision.

STANDARD OF REVIEW

Summary judgment is appropriate, "if the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." ORCP 47C. To demonstrate no material issue of fact exists, Plaintiff must show that when the record before the court is viewed in the light most favorable to Defendant, no reasonable juror could return a verdict in Defendant's favor. ORCP 47C; *Stamper v. Salem-Keizer School District*, 195 Or App 291 (2003). Defendant has the burden of producing evidence on any issues raised in the motion for which defendant would have the burden of persuasion at trial. ORCP 47C. Plaintiff's Motion for Partial Summary Judgment can be granted only if the Court determines that there are no genuine issues of material fact considering the evidence of both parties and no reasonable juror could decide in defendant's favor as a matter of law. *Jones v. General Motors Corporation*, 325 Or 404 (1997).

UNDISPUTED FACTS

On or about August 20, 2007, Plaintiff and Defendant entered into a Sale Agreement for the purchase and sale of three parcels of real property located in the City of Keizer, Marion County, Oregon. (Exh A to Yarbrough Declaration[1]; hereinafter, the 2007 Agreement.[2]) Paragraph 2 of the 2007 Agreement provides that the purchase price for the sale is $751,000, "payable to Lawyer's Title for benefit of Seller by cashier's check or wire transfer at closing."

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[1] Mr. Yarbrough executed two Declarations in connection with the Motion for Partial Summary Judgment. The first, dated February 23, 2012, attaches exhibits A through E; the second, dated April 10, 2012, attaches exhibits 1 through 3. Both declarations will be referred to as the Yarbrough Declaration.

[2] The parties refer to the 2007 Sale Agreement property as Tax Lots 1700, 1800, and 1900 in Township 6S, Range 3W, Section 36, Marion County, Oregon; and as the St. Croix Property; there is no dispute about what property is the subject of the 2007 Sale Agreement.

As part of the contract, Paragraph 9 of the 2007 Agreement provides in pertinent part:

"Closing of the Transaction shall be sixty days (60) after the City of Keizer's approval of the Area "C" development. . . . "

Paragraph 14 of the 2007 Agreement is an integration clause which provides:

"This Agreement embodies the entire agreement of the parties hereto. Buyer (Defendant) acknowledges that Buyer has not relied upon any statements made by Seller (Plaintiff) that are not set out in writing in this Agreement."

On or about April 3, 2009, Plaintiff and Defendant executed an Addendum to the 2007 Agreement, entitled "St. Croix Agreement Addendum." (Exh B to the Yarbrough Declaration; hereinafter, the First Addendum). In the First Addendum, the parties expressly agree that the First Addendum is supplemental to the 2007 Agreement, and all terms in the original are included. The parties also agreed that the provisions of the First Addendum control if there is any conflict, inconsistency or incongruity between the provisions of the First Addendum and of the original 2007 Agreement.

Paragraph 3 of the First Addendum provides:

"Due to the fact that the property has not closed, Buyer [defendant] agrees to provide additional security consisting of 13 (sic) lots in Mill City Oregon (known as Santiam Points) and grants Seller [plaintiff] a First Trust Deed on all lots." It further provides that, "as the lots are sold, the proceeds will be first applied to the interest, then principal [$751,000] of the original Sales Agreement." Additionally, it provides that Buyer will make a payment in the amount of $250,000, plus interest, on March 1, 2010 toward the sale price of the property covered by the 2007 Agreement.

Paragraph 5 of the First Addendum provides:

"It is further agreed that Buyer shall pay to Seller the sum of Two-Hundred Fifty-Thousand Dollars ($250,000.00) plus accruing daily interest from April 3, 2009, of Forty-Three Dollars and Eighty-Four Cents ($43.84)

on March 1, 2010, unless the final closing has occurred." Defendant executed a First Trust Deed to Plaintiff on June 2, 2009, with respect to 12 Mill City lots.

A couple weeks before the March 1, 2010 deadline for defendant to make the advance payment of $250,000, the parties executed another agreement. (Exh 2 to Yarbrough Declaration; hereinafter, the Third Agreement".) In the Third Agreement, defendant affirmatively represented that he was "currently indebted" to plaintiff in the principal amount of $250,000 plus interest; and further, that he was not able to pay the $250,000 advance payment due under the First Addendum. In lieu of the March 1, 2010 advance payment detailed in the First Addendum, the parties agreed that defendant would execute Deeds in Lieu of Foreclosure conveying all interest in the 12 lots in Mill City, Oregon to plaintiff. The Third Agreement deferred defendant's obligation to pay the $250,000 back to the original closing date (60 days after Area C approval) in consideration of his executing the necessary Deeds in Lieu of Foreclosure on February 17, 2011. This term gave plaintiff additional title/ownership rights regarding the pledged security for the $250,000 payment, despite defendant's anticipated default on that payment. It served two additional purposes. First, it added a provision permitting defendant to repurchase the deeded properties (assuming they were not yet sold to bonafide purchasers) at the same time the 2007 Agreement property sale closed; and it allowed plaintiff the right to market and sell (rather than hold) the deeded Mill City properties after May 18, 2011, if the closing was again delayed by the City's inaction, and then to pursue recovery of the balance of the $250,000 or the whole $751,000, less proceeds of the Mill City sales. Yarbrough accepted the conveyances. The record is silent as to whether he sold any of the properties.

The Third Agreement acted to modify the obligation expressly agreed to in the First Addendum (Exh B to Yarbrough Declaration). By March 1, 2010, final closing had not occurred because approval of Area C had not occurred.

The parties made yet another agreement. On or about March 18, 2011, Plaintiff and Defendant executed a second Addendum to the 2007 Agreement (Exh C to Yarbrough Declaration; hereinafter the "Second Addendum"). Defendant agreed to pay to plaintiff $26,700 unequivocally

for dirt which plaintiff moved on to property owned by defendant. Paragraph 3 of the Second Addendum provides as follows:

"Chuck Sides and/or assigns agrees to purchase from Jack Yarbrough approximately 4600 yards of dirt for $3,500.00 and is responsible for the cost of moving said dirt currently situated on property known as "the Janrae property", located behind McCoy Freightliner and Pilot, to a previously agreed location in a large field south of St. Croix in Keizer, OR at a cost of $20,700." The parties agree that the total amount due was $26,700 and that the dirt was delivered. The total amount of $26,700.00 was "to be added to the sales price of St Croix lots at the rate of 12% and is to be paid no later than May 14, 2011." The Second Addendum makes no reference to the due date of the obligation being conditioned on approval of Area C development or the closing date set forth in the 2007 Agreement. It simply made clear that by now defendant owed plaintiff $777,700; $26,700 due on May 14, 2011 and the balance due 60 days after the Area C development approval.

On April 18, 2011, the City of Keizer by Order approved the master plan/subdivision for the Keizer Station Plan -- Area "C" development. (Exh E to Yarbrough Declaration). Defendant did not close the sales transaction on June 17, 2011.

An appeal of the City's Order was filed on May 5, 2011. On August 19, 2011, LUBA remanded the approval to the City of Keizer. LUBA's decision was appealed to the Oregon court of Appeals. On November 30, 2011, the Court of Appeals affirmed the LUBA decision without opinion.

ANALYSIS AND ORDER

First Claim (Breach of 2007 Sales Agreement)

On April 18, 2011, the City of Keizer approved the Area "C" development, thereby triggering defendant's obligation to close the sale of the real property 60 days later, on June 17, 2011. The 2007 Sale Agreement requires defendant to pay plaintiff $751,000 for the St. Croix lots when the City of Keizer grants approval of Area C development. It is undisputed that the City of Keizer, by Order, granted that approval on April 18, 2011.

Defendant had 60 days, or until June 17, 2011 to close the sale and make the payment. Defendant failed to do so. Defendant's failure to close the deal and consummate the 2007 Sale constitutes a breach of the contract.

It is true that a material breach of a contract cannot occur if performance is not yet due. Performance is not yet due if a condition precedent has not yet occurred. A condition precedent is an event that, unless excused, must occur before a duty of immediate performance of a promise arises - before a breach can occur. *Spence v. Allen,* 199 Or 255 (1952). Development approval from the City of Keizer was a condition precedent to Sides' obligation to close the transaction and pay the purchase price: "Closing of the Transaction shall be sixty days (60) after the City of Keizer's approval of the Area "C" development."

Defendant argues that "approval of the Area "C" development" in the parties' contract must be read to infer that the approval be "final approval after any and all appeals have been filed, heard, decided, and all appeals exhausted." If this is the event that defendant wanted to occur before he was obligated to perform, he did not say it in the agreement and cannot now insert it. Neither the parties' 2007 Agreement, nor any subsequent addendum or agreement make any reference to awaiting appeals before property would change hands. The contract does not contain any reference to the obligation to pay being deferred pending any appeals. The parties did not negotiate for that contingency. Defendant could have negotiated for that contingency and, had he done so, the parties may find themselves in different standing.

A party may not change the terms of a contract or ask a court to change the terms of a contract, particularly when there is no ambiguity. The contract between Yarbrough and Sides is enforceable because the contract "closing" terms have only one reasonable meaning. Moreover, evidence submitted by either party is only admissible to explain the circumstances under which the contract was made and cannot vary the terms of the written agreement. *Taylors Coffee Shop v. Taylor,* 56 Or App 419 (1982). ORS 42.230 provides:

> In the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit

> what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.

ORS 42.230 is clear: a court reviewing a contract may not insert terms that are not there. *Johnson v. Campbell,* 259 Or 444 (1971), (restriction of property "for residential use only" did not mean that the property was to be used only for single family residences; that interpretation would add to and thus be inconsistent with the express terms of the covenant).

Here, there is no patent ambiguity. The closing provision states: "Closing of the transaction shall be sixty days (60) after the City of Keizer's approval of the Area "C" development..." The only arguable ambiguity is whether the parties intended to close upon the final approval of Area C, after all appeals had been exhausted, or whether the parties intended to transfer ownership of the parcels following the first approval. Once the City gave its approval on April 18, the closing date was set and the clock starting ticking. The fact that an appeal sought to (and ultimately did) delay defendant's ability to obtain building permits for Area C, or to move forward with the development due to LUBA's remand of the City of Keizer's "approval" of Area C, is evidence this court cannot insert into the parties' agreement. The fact is, no such condition is evidenced in the four corners of what is an unambiguous contract. This construction of the parties' many agreements does not offend or invalidate any other provision.

I gave due consideration to the Court's analysis of this issue articulated in *Riverside Homes, Inc. v. Murray*, 230 Or App 292 (2009); citing *Yogman v. Parrot*, 325 Or 358 (1997). When interpreting a contractual provision, a court first examines the text of the disputed provision in the context of the document as a whole, and determines, as a matter of law, whether the provision is ambiguous; if the contractual provision is clear, the analysis ends, but if the provision remains ambiguous, the court then examines extrinsic evidence of the contracting parties' intent. In Riverside, the buyer (plaintiff) and seller (defendant) had a dispute regarding the closing terms of their sales agreement to purchase and sell real property. The court reviewed the language of the closing provision and determined that both proposed constructions of the contract were reasonably plausible and therefore had to consider extrinsic evidence of the contracting parties'

intent. *Riverside*, 230 Or App at 306-307. Unlike the present case, in *Riverside*, the parties set out different closing scenarios depending on the timing of a number of possible conditions affecting development of the property. The court allowed extrinsic evidence that clarified the circumstances surrounding the contract's construction. Id. at 307. After reviewing credible witness testimony, the Court of Appeals concluded that both parties had intended to delay closing until a mutually agreed street dedication contingency was satisfied or waived, resolving the ambiguity in favor of the plaintiff. Id. at 307. In this case, the parties identified one operative date – approval by the City of Area C – and that date came and went. Even allowing that defendant is unable to do with the parcels what he had hoped to do, he points to no contractual term that hinges on said explanation. Nor does he offer any evidence that this was both his and the seller's mutual intent.

Similar to the developers in *Riverside*, Yarbrough and Sides were described in oral argument as experienced, professional real estate developers familiar with the terms and construction of the contract instrument which determines a closing date contingent upon some other condition outside their control. Unlike the parties in *Riverside*, defendant omitted any mention of an extension or termination of the contract in the event of an appeal. (*Riverside, supra,* 230 Or App at 294; stating "... in the event of an appeal of the preliminary plat for the subdivision, the six-month deadline for closing and other deadlines would be extended.") *Riverside* also differs from this case because extrinsic evidence was admitted to ascertain the intent of the parties because the court found the closing terms to be ambiguous. In the present case, the court need not consider extrinsic evidence because the terms of the contract are not ambiguous, either patent or latent, and because parol evidence of either party may not be admitted if it contradicts the express language of the contract. *Yogman*, *supra*, 325 Or at 361.

Because the duty of the court is "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted," I conclude that the plain language of the contract, clearly and unambiguously sets forth the terms of closing with no additional mention of appeals. Had defendant wanted that term in the contract, he should have put it in the contract. He did not and, as a matter of law, he is obligated to make payment for the lots. He

is in default, and plaintiff is entitled to summary judgment as to that default, and to pursue remedies available to him.

SECOND CLAIM (BREACH OF FIRST ADDENDUM)

The second claim plaintiff has is for the immediate payment of $250,000, claiming breach of the First Addendum. On or about April 3, 2009, Plaintiff and Defendant executed an Addendum to the 2007 Agreement, entitled "St. Croix Agreement Addendum." Paragraph 3 of the First Addendum provides:

"Due to the fact that the property has not closed, Buyer [defendant] agrees to provide additional security consisting of 13 (sic) lots in Mill City Oregon (known as Santiam Points) and grants Seller [plaintiff] a First Trust Deed on all lots."

It further provides that, "as the lots are sold, the proceeds will be first applied to the interest, then principal [$751,000] of the original Sales Agreement." Additionally, it provides that Buyer will make a payment in the amount of $250,000, plus interest, on March 1, 2010 toward the sale price of the property covered by the 2007 Agreement.

Defendant executed a First Trust Deed to Plaintiff on June 2, 2009, with respect to 12 Mill City lots.

The First Addendum is the subject of the Third Agreement, which the parties entered into on February 17, 2011, after defendant was in default on his obligation to pay the $250,000. A couple weeks before the March 1, 2010 deadline for defendant to make the advance payment of $250,000, the parties executed another agreement. (Exh 2 to Yarbrough Declaration; hereinafter, the Third Agreement".) In the Third Agreement, defendant affirmatively represented that he was "currently indebted" to plaintiff in the principal amount of $250,000 plus interest; and further, that he was not able to pay the $250,000 advance payment due under the First Addendum. In lieu of the March 1, 2010 advance payment detailed in the First Addendum, the parties agreed that defendant would execute Deeds in Lieu of Foreclosure conveying all interest in the 12 lots in Mill City, Oregon to plaintiff. This agreement recognized that plaintiff had the present ability to foreclose on the properties, based on the First Deed of Trusts, and recognized defendant's acknowledged default on his

obligation, and served to transfer those properties to plaintiff, giving defendant the opportunity to repurchase them at closing for the $250,000 he still owed.

The Third Agreement deferred defendant's obligation to pay the $250,000 back to the original closing date (60 days after Area C approval) in consideration of his executing the necessary Deeds in Lieu of Foreclosure on February 17, 2011. This term gave plaintiff additional title/ownership rights regarding the pledged security for the $250,000 payment, despite defendant's anticipated default on that payment. It served two additional purposes. First, it added a provision permitting defendant to repurchase the deeded properties (assuming they were not yet sold to bonafide purchasers) at the same time the 2007 Agreement property sale closed; and it allowed plaintiff the right to market and sell (rather than hold) the deeded Mill City properties after May 18, 2011, if the closing was again delayed by the City's inaction, and then to pursue recovery of the balance of the $250,000 or the whole $751,000, less proceeds of the Mill City sales.

This interpretation of the contract is not only permissible but likely because the Third Agreement was clearly intended to affect the parties' rights and responsibilities with respect to the security for the First Addendum and defendant's obligation to make the $250,000 advance payment. If it did not affect these terms, there is no consideration for it. Even if the parties believe that other evidence disproves the above analysis and want to offer it, the summary judgment plaintiff seeks is inappropriate.

THIRD CLAIM (BREACH OF SECOND ADDENDUM)

The language is clear and unambiguous that defendant will pay plaintiff $26,700 by a date certain. He has failed to do so and plaintiff is entitled to summary judgment. Defendant attempts to expand the terms of the parties' agreement by adding terms that are simply not there. Plaintiff and defendant entered into the Second Addendum Agreement on March 18, 2012, one month *after* executing the Third Agreement that resulted in defendant's executing the Deeds in lieu of Foreclosure. Therefore, the Third Agreement could not legally excuse defendant's performance of a later assumed obligation. Defendant was already obligated to execute and record Deeds in Lieu of Foreclosure; his performance of that obligation had no effect on his separate and new obligation dated March

18, 2011 whereby he agreed to purchase from Plaintiff approximately 4600 yards of dirt and pay for the cost of moving the dirt in the total amount of $26,700. The total amount was "to be added to the sales price of St Croix lots at the rate of 12% and is to be paid no later than May 14, 2011."The agreement with respect to the $26,700 is clear and unequivocal. Defendant's failure to pay $26,700 by the date due constitutes a breach of the parties' Second Addendum Agreement.

CONCLUSION

Plaintiff's Motion for Partial Summary Judgment is allowed as to the First and Third Claim. Plaintiff's Motion for Partial Summary Judgment is denied as to the Second Claim.

Will Mr. Storkel please prepare an order and judgment consistent with this letter opinion?

Very truly yours,

Mary Mertens James
Circuit Court Judge

MMJ/sas
cc: File